IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.374 OF 2004

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1.MAHASHTRA STATE ELECTRICITY BOARD
2.MAHARASHTRA STATE DISTRIBUTION COMPANY LTD. ...PETITIONERS

V/S.

1.DATAR SWITCHGEAR LIMITED
2.THE STATE OF MAHARASHTRA ...RESPONDENTS

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Mr.T.R. Andhyarujina, Sr.Counsel with Mr.E.P. Bharucha, Mr.Gaurav Joshi, Ms.Ruby Kerawala, Mr.A.M. Khattawala and Mr.Kiran Gandhi i/b Little & Co. for the Petitioners.

Mr.Rafiq Dada, Sr.Counsel with Mr.Rohit Kapadia, Mr.V.V.Joglekar, Mr.C.S.Balsara, Mr.Mukesh Tally i/b S.Mohammedbhai & Co. for Respondent No.1.

Ms.K.S.Bharucha, AGP for State.

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CORAM: D.K.DESHMUKH, J.

DATED: 3rd August,2005

JUDGMENT:

1. By this Petition filed under Section 34 of the Arbitration & Conciliation Act (hereinafter referred to as the "Act" for the sake of brevity), the Petitioner challenges the award made by the Arbitral Tribunal dated 18-6-2004. By that award, the Arbitral Tribunal has directed the Petitioner No.1 Maharashtra State Electricity Board to pay to the Respondent No.1/ Datar Switchgears Ltd. a sum of Rs.185,97,86,399/- as damages in respect of work

order dated 27th March, 1997. The Petitioner No.1 MSEB has also been directed to pay interest at the rate of 10% p.a. on the sum of Rs.179,15,87,009/-. The Arbitral Tribunal has also directed the Petitioner No.1 to pay to the Respondent No.1 Datar Switchgear an amount of Rs.1,00,00,000/- towards costs of the proceedings.

2. The facts that are relevant and material for deciding this petition are: the Petitioner No.1/ MSEB is incorporated pursuant to the provisions of Electricity (Supply) Act, 1948. When the petition was filed, there was only one Petitioner namely the M.S.E.B. However, due to the provisions of the Electricity Act, 2003 the Petitioner No.2 was constituted and the assets and liabilities of the Petitioner No.1/ M.S.E.B. were taken over by the Petitioner No.2/ Maharashtra State Distribution Company Ltd., and therefore, the Petitioner No.2 was added as the Petitioner and the Respondent No.2 State of Maharashtra was added as the Respondent. The Respondent No.1 (hereinafter referred to as the "Datar" for the sake of brevity) manufacture Low Tension Load Management Systems ("LTLMS" or "the contract objects"). These contract objects by supply

of reactive power reduce the consumption of electricity and consequently reduce the transmission and distribution losses of electricity. The M.S.E.B. had awarded a contract in the year 1993-94 to Datar for installation of 12,555 Low Tension System Capacitors (LTSC). The M.S.E.B. invited tender for supply of LTLMS, which were technologically better than the earlier LTSC. Initially, Datar was awarded contract for installation of 11,760 LTLMS (hereinafter referred to as the contract objects) (These 11,760 contract objects shall hereinafter refer to as "B-1"). This contract was awarded by letter of intent dated 15-1-1997. Subsequently, Datar by letter dated 24-1-1997 offered to replace the existing 12,555 LTSC by the contract objects and therefore a letter of intent was issued by MSEB to Datar on 18-2-1997 for replacement. These replacement contract objects shall hereinafter be referred to as "B-2". MSEB offered additional quantities of 23,672 contract objects to be installed by Datar. This offer was accepted by Datar. These additional quantities of contract object shall hereinafter refer to as "B-3". The work order dated 27-3-1997 was issued by MSEB to Datar for 11,760 contract object (B-1), 12,555 replacement contract

object (B-2) and 23672 contract object (B-3), i.e. totalling 47,987 contract objects. Detail instructions were contained in the work order for installation of these contract objects. The work order provided that the M.S.E.B. would supply to Datar a list of location where these contract objects were to be installed. It appears that by February, 1999 Datar could install only 17,294 contract objects. By letter dated 19-2-1999, Datar terminated the contract for the uninstalled 30693 contract objects. It was noted in the letter dated 19-2-1999 that 17294 contract objects have been installed and offer was made to maintain those contract objects as per the terms of the contract, if the rate for the same is paid without demur or dispute. However, subsequently, it appears that the contract in relation to 17294 contract objects was also terminated by letter dated 21-4-1999. It may be pointed out here that according to the terms of the Work Order, after these contract objects were installed, they were to be leased to the MSEB for a period of 10 years from the date of their installation on payment of rent which was mentioned in the Work Order and after expiry of period of 10 years the contract objects were to continue with the

MSEB, but the amount of rent was Rs.1/- per contract object.

3. As a dispute arose between the parties, the matter was referred to arbitration. The Arbitral Tribunal was constituted. Before the Arbitral Tribunal, Datar submitted a claim statement, which was resisted by MSEB. MSEB also made some counter claims. Voluminous documentary evidence was produced by the parties. The parties also led oral evidence. The Arbitral Tribunal has passed a detailed award rejecting the counter claim made by the M.S.E.B. and awarding damages in favour of Datar, as observed above. It is this award which is challenged in the present petition.

4. The learned Counsel appearing for the Petitioner/ MSEB submits that (I) the Tribunal erred in awarding the damages by way of rent for 17294 panels, which were installed and commissioned by Datar. The Tribunal has held that there is a fundamental breach of the contract as the Board had not supplied to Datar the list of locations where the panels were to be installed.

(II) The Tribunal therefore accepted the Claimants contention that the Respondents failed to supply the list of DTC locations and thereby prevented the Claimants from carrying out the work of installation and deprived the Claimants of the lease rent. The Tribunal itself found that the fundamental breach would apply only to those panels for which the locations were required to be given by the Board. The Tribunal's finding of breach could never be applied to the 17,294 panels, which were already installed. To say that there was a breach of contract in respect of installed objects would be a contradiction in terms. However in awarding damages the Tribunal erroneously awards damages in respect of 17,294 contract objects which were installed amounting to sum of Rs.108,02,53,173. There is no foundation at all for the award of damages according to the Tribunal's own premises for 17294 panels.

III) If Datar wanted to claim that the fundamental breach in not supplying location affected the entire contract for even installed objects it was incumbent on him to make out that case before the Tribunal and the Tribunal had to hold that as a result of failure to supply location the entire contract for even the

installed object was rendered commercially unviable. Datar made no such submissions before the Tribunal and the Tribunal has also not recorded such a finding.

IV) There are only two grounds of breach urged by Datar before the Tribunal, which had prevented him from performing his part of the contract: a) That the Board failed to supply the list of DTC locations and thereby prevented Datar from carrying out the work of installation b) That the Board did not renew Letter of Credit beyond April 30, 1999.

The Tribunal has totally rejected the second ground of breach i.e. the Board not renewing the Letter of Credit.

So far the first ground regarding the alleged breach by the Board the following facts are striking to show that Datar himself did not allege that there was any breach by the Board in respect of installed objects.

It was Datar's own case that failure to supply the locations had resulted in his incurring damages in respect of 30,694 uninstalled panels not 17,294

installed panels. This is evidenced from:

i) Datar's letter dated 19th February 1999 in which he claims damages only for the uninstalled contract objects and agrees to continue to maintain 17294 installed objects. No damages were claimed in respect of the installed objects. Datar terminated the entire contract on 21.4.99 only because the Board had not renewed the Letter of Credit.

ii) In the interim application it is stated that the contract was terminated on 19th February, 1999 for 30,693 uninstalled contract objects for want of DTC locations.

iii) In Para 37 of his evidence in cross examination at page 67 he has stated that the breach in respect of abrogation of Letter of Credit was committed on April 30, 1999. It is further stated that "I terminated the contract on February 19, 1999. I had partially terminated the contract on February 19, 1999. I was desirous of continuing the contract in respect of installed objects. Even that part of the contract stood terminated on April 30, 1999".

iv) It is significant that so far as the installed contract objects were concerned it was Datar's contention that the contract came to the end on 30th April 1994 as the Letter of Credit lapsed.

v) Datar continued to maintain 17,294 panels even after 19th February, 1999 and upto April 1999.

iv) Datar recovered rent for the entire 17,294 contract objects in April 1999 under the Letter of Credit for the period ending 31st March 1999.

V) MSEB had in the meeting held on 11th March 1999 and their reply dated 5th April 1999 requested Datar to go ahead with the progress so as to get the intended benefits by successful implementation of the scheme. This would show that the Board was at all times ready and wiling to carry out all obligations under the contract including for 17,294 installed objects. There is no finding by the Tribunal that the Board was not willing to carry out its obligation for the 17294 panels.

VI) The law on the point is clear that when the

innocent party elects to terminate the contract he puts an end to all the primary obligations by that party which remains unperformed, but rights are not divested or discharged in respect of contract performed.

The expression of fundamental breach is only confined to those primary obligations of both the parties, which remained to be performed.

VII) There is no submission made by Datar in any pleadings or in any oral submissions before the Tribunal that on account of the failure of MSEB to give locations for 30,693 panels, which remained to be installed, the entire contract become unviable or the obligation to maintain 17,294 installed contract objects became onerous or a different bargain. Such a submission and arguments are not even recorded by the Tribunal. This oral submission has been made for the first time in Court by Datar without any pleading or evidence. This case is demonstrably incorrect even otherwise.

a) Datar had himself treated that the contract was terminated for the uninstalled objects and the Board

is liable to pay damages only for the uninstalled objects in his letter dated 19th February 1999 as also in his pleadings aforesaid.

b) Datar was originally awarded 11,760 contract objects panels under the tender by letter of intent dated 15th January, 1997. Datar requested that the order be enlarged to allow him to replace the existing 12,555 panels by letter dated 24th January, 1997. Hence these panels were included in the work order as B- II. The Board unilaterally gave a further order for 23,672 B-III panels. The alleged breach for 30693 panels therefore cannot make the contract unviable for the installed panels, which far exceeded the panels awarded under the tender.

5. The learned Counsel for the MSEB further submits that there is no fundamental breach or otherwise in not supplying the locations for stranded panels. Even if MSEB's officials failed to give locations for the panels, Datar was not entitled to terminate the contract for that reason.

. Datar had admittedly and it is submitted

fraudulently, recovered the rent for the stranded panels i.e. those manufactured by him and not installed for alleged want of DTC locations from 1/4/1998 to 30/9/1998 and claimed the rent from 1/10/1998 to 31/12/1998 Datar collected the amount in his bills for the stranded panels from the LC.

. The Credit note dated 18th February, 1999 issued by Datar was also "provisional", "under protest" and "without prejudice".

. Even in his letter of 18th February 1999 Datar maintained that he would claim rent for those stranded panels 'legitimately' while giving **provisional credit for Rs.4.34 Crores.**

. In his letter of 8th June 1998 and all similar letters Datar had stated that "We have to most humbly and respectfully but reluctantly point out that the rent of the stranded panels is accruing on your account from the date of readiness.

. All Datar bills submitted for payment made no distinction between installed and stranded panels e.g. bill dated 7/10/1998. The covering letter,

which was stated the bill for the installed LTLMS. The bill for 1,700 panels included only 226 which were installed. In this manner Datar fraudulently gave the impression that he was billing for installed objects only and recovered rent for uninstalled stranded objects. All bills of Datar were on similar terms and similar misrepresentation.

. From aforesaid facts, it follows that the assuming the Board failed to give the DTC locations in respect of stranded objects aggregating to 14206. Datar was not prejudiced as he had himself taken remedial measures to protect himself and recovered the rent albeit fraudulently. Therefore there can be no question of fundamental breach in respect of these stranded panels.

. In the Boards Written Submissions before the Hon'ble Tribunal the Board had objected that 'the Claimant were already recovering as damages the entire rent for the stranded objects without any forum having adjudicated the claim of the Claimants for such damages. In the premises the Claimants were not entitled to terminate the contract as a result of the alleged breach in delay in supplying of the DTC

locations".

. Datar never gave up his contention that he was entitled to claim rent for stranded objects even though they were not installed. Datar maintained that he was entitled to claim rent for the stranded objects in his evidence.

Even in the Tribunal Datar maintained that he was entitled to legitimately recover rent for the stranded objects. The Tribunal states that "It is the stand of the Claimants that once the contract objects were cleared for the installation and if the installation cannot be carried out for want of list of the locations then the right to claim lease rent arises. The submission is clearly untenable".

In these circumstances, there was no question of Datar giving up his claim to rent of stranded panels or elected to give it up before termination as contended by Counsel for Datar.

6. The MSEB submits that in any event as assuming without admitting that there is a failure of the

Board to give timely locations for the panels to the Datar, such a failure did not prevent and cannot prevent Datar from replacing the panels at the locations, which he had earlier installed in his own panels i.e. 12555 B-II panels. Datar had not only installed the LTSC Panels but was in fact maintaining the same and claiming lease rent. He thus knew their locations.

. Datar has himself in his earlier letters dated 5th and 7th September 1997 requested locations for B-I and B-III and not for B-II.

. The work order mentioned the sequence of zones namely Kolhapur, Nasik, Aurangabad and further directed Datar to install for sequence B-I, B-II and B-III but in fact from outset Datar himself simultaneously installed B-I, B-II and B-III categories. This is evident from the bills for Nasik Circle for the quarter ending 31st March 1998 and 30th June 1998 where Datar has billed for B-I, B-II and B-III category which demonstrate that he had installed contract panels in all three categories and no restrictions were imposed upon him.

. The Board's letter dated 17th June 1998 clarified that Datar should be allow to execute work feeder wise in respect of sequence of Schedule B-I, B-II and B-III of the work order.

. Datar had no difficulty in replacing of LTSC panels as is evident from his letter dated 20th July 1998 in which he had stated that "replacement process would start after about a month once the rains have receded".

. On 21st December 1998 the Board directed to Datar to follow the sequence as indicated in clause 5.2 of the work order and stated that quantity in B-III should not be executed till quantity under B-I and B-II are completed This direction does not prohibit Datar to install B-I and B-II simultaneously. Datar also interpreted this letter correctly which is evident from his interim application in which Datar states "Respondents order stoppage of work under Schedule B-III till further instructions." In view of this the Tribunal was not correct in stating that it was impossible for the Claimants to install objects of category B-II without exhausting installation of category B-I and for which locations were not given.

. In reply to the Boards letter 21st December 1998 Datar in his letter dated 23rd December 1998 refused to follow the directions and stated that "since no permission was necessary, none was given, hence non can be withdrawn" and stated that "this directions is a direct breach of the undertaking and covenants and as such not acceptable to us and not binding upon us"

6A. From the aforesaid it is clear that atleast for installation of balance 10,541 B-II locations Datar was not prevented from replacement/ installation and therefore there is no breach by the Board atleast in respect of this category. The Tribunal wrongly awarded damages in respect of 10541 uninstalled B-II objects therefore this error is patent on the face of the award and has caused substantial injustice to MSEB in a sum of over Rs.53 crores.

. There is no clear finding by the Tribunal that Datar was disabled from installing the replacement panels.

. The Ld. Arbitral Tribunal has acted dehors the express terms of the Work Order by awarding a sum of

Rs.185,97,86,399/- to the Respondents on account of **the claim of agglomerated rent of 7 years for the 17,294 contract objects installed but not maintained by the Respondents and the agglomerated rent of 5 years for 14,206 contract objects allegedly manufactured but not installed. Under Clause 11 of the Work Order, lease rent was payable to the Respondents only for installed and working contract objects. For the reasons stated above there was no fundamental breach of contract by the Petitioners in so far as 17,294 installed objects were concerned, the contract in respect thereof was unilaterally terminated by the Respondents after initially choosing to keep it alive, and no damages could be awarded for the same.**

. The Ld. Arbitral Tribunal committed a grave error, acted irregularly and arbitrarily in a manner which caused substantial injustice to the Petitioners, contrary to the law in India as also to the public policy by taking a "rough and ready measure" to find out the cost of maintenance and installation. It is submitted that such a rough and ready measure cannot be used to award such a large sum of money as damages. Such award is totally

arbitrary. It was incumbent upon the Ld. Arbitral Tribunal if necessary to call upon the parties to lead further evidence or in the alternative to reject the claim. It is further relevant that the Respondents should have in their possession all the relevant evidence regarding the maintenance cost as they had actually maintained the contract objects for one year.

. The Learned Arbitral Tribunal committed a patent error on the face of award and acted de hors the contract by awarding lease rent at the higher rates applicable for the first six years and ignoring the lower rates applicable for the next 4 years, in respect of objects installed in categories under Annexes B-I and B-III of the Work Order. The lease rent payable for the subsequent 4 years, i.e. after the expiry of the first six years was significantly lower. The additional damages awarded on this count alone would exceed several crores of Rupees.

. The Ld. Arbitral Tribunal failed to take into consideration that out of 17,294 installed contract objects, 2,014 objects admittedly pertained to the category under Annexure B-II of the Work Order for

which reduced lease rental was payable.

. The Ld. Tribunal awarded 10 years rent for 17,294 installed objects and thereafter deducted 3 years rent as expenses required for maintenance of the contract objects and for arriving at the present value of the rent payable over 10 years on a 'rough and ready basis'. Even if damages can be awarded on the basis of rent, the same could only be on the basis of appropriate discounting of the rent.

. The Ld. Tribunal failed to appreciate that if the contract had been performed by the Respondents, the rent would have been payable over a period of 10 **years. If rent is to be basis of damages, the same would be payable in one lump sum. Thus the rent payable over the entire period of the contract had to be discounted as payable on 18th April 1999 the date of termination of the contract. The necessary discounting tables had been provided by the Petitioners to the Tribunal. The Tribunal has directed interest to be paid on the award at the rate of 10% p.a. Thus 10% p.a. could have been the appropriate discounting factor and the same would in itself (apart from further discounting required for**

maintenance and repair costs) entitled the Petitioners to a discount of 40%. Thus the Petitioners would be entitled on the basis of the discounting factor itself to additional discount of atleast 1 years rent equal to Rs. 17.39 crores for the installed objects and Rs. 14.28 crores for the uninstalled objects aggregating to over Rs. 31.5 crores. The Arbitral Tribunal failed to consider the materials on record and committed a patent error causing substantial injustice to the Petitioners. It has resulted in an unfair and unjust result. Recourse to 'rough and ready' methods when accurate information was available, is in itself sufficient to cause grave injustice to the MSEB.

. The Learned Arbitral Tribunal committed a grave error apparent on the face of the record as also failed to consider the submissions in that behalf **made by the Petitioners herein, by holding that the only difference between the contract objects installed and the contract objects allegedly stranded in the Respondents' factory was that the expenses for installations were incurred in first category whilst in the latter category expenses of installation were yet to be incurred. The basic difference which the**

Ld. Arbitral Tribunal failed to consider or to appreciate was that in the latter category i.e. stranded objects, the Respondents had not even supplied the same to the Petitioner. Whilst calculating damages the Petitioners were entitled to credit for the value of the objects retained by the Respondents.

. Under the contract even after the expiry of the period of 10 years the panels were to remain with the Petitioners .The Respondents have been unjustly enriched as they have retained the panels and have also been awarded the rent in respect thereof. The Arbitral Tribunal failed to consider the materials on record, acted dehors the substantive law on computation of damages and committed a patent error causing substantial injustice to the Petitioners. It has resulted in an unfair and unjust result.

. It is not is dispute that 16,487 contract objects were not even manufactured. The Arbitral tribunal wrongly awarded Rs.6,52,55,546 as the cost of the raw **materials for these without even directing the Respondents to hand over the raw material to the Petitioners or giving any credit for the same. The**

said material was in fact disposed off by the Respondents. The Respondents thus have been unjustly enriched by retaining or selling in the market the said raw materials and also receiving the cost thereof from the Petitioners and the same is against public policy.

. The Arbitral Tribunal failed to consider that no evidence was produced by the Respondents to establish that any efforts were made by them to mitigate the losses. The reliance by the Tribunal on Ex. C-16 was misconceived and irrelevant evidence was relied on as the letters contained therein related to the period September 1998 to November 1998 whilst the contract was terminated only in February 1999. The mitigation had to be after termination of the contract and not before. In fact, the Arbitral Tribunal proceeded on its presumption without any evidence or basis that "the contract objects cannot be disposed in open market".

. The learned Counsel for the Petitioners further urged that it was argued on behalf of Datar that the MSEB and the Maharashtra State Distribution Company Limited ("MSD") were not entitled to maintain the

present arbitration petition after 4th June, 2005 when all property, interest in property, rights and liabilities which immediately before that date vested in the MSEB shall vest in the State Government. The argument proceeded on the basis that the liability under the award under challenge had not been recognised as the contingent liability and consequently the same was not and could not have been taken over by MSD. It was further argued that the said liability of the award vested only in the State of Maharashtra and the State alone was competent to maintain the petition.

7. The learned Counsel appearing for the Respondent No.1/ Datar, on the other hand, submits that the Petitioners have orally argued that:

(a) There was no breach in respect of 17294 objects.

(b) that there was no termination in respect of 17294 objects on 19-2-1999.

(c) That the contract was severable qua the 17294 objects and in view of this no damages in that respect could have been awarded.

(d) That in view of the fact that the first Respondents have charged for the stranded panels, he could not terminate the contract on the ground of fundamental breach for non supply of DTC locations.

(e) That the 1st Respondent elected and proceeded with the trial in the Arbitration Proceedings making a claim for the rent of the stranded panels.

(f) That the only remedy available to the Respondent was to seek specific performance.

It is submitted that there is no ground in the Petition challenging the Award on the basis of the six propositions which were orally argued.

It is further submitted that no such case was pleaded before the learned Arbitrator either.

8. Further it is submitted that it is not open to the Petitioners to argue the Petition on this basis since the decision of the Arbitral Tribunal on all the issues have been decisions exclusively within

their jurisdiction. Error if any within the jurisdiction cannot be the subject of a challenge u/s 34 of the Arbitration and Conciliation Act, 1996. In any case it is not even the case of the Petitioners in the Petition that the alleged errors are in any manner outside the jurisdiction of the Arbitrators.

9. It is submitted that there is no ground in the Petition to challenge the finding of the Ld. Arbitrators that contract was terminated by the Respondents on 19.2.99. It is submitted that the contract is one and indivisible in respect of 47,987 contract objects. A breach of a fundamental term of a contract goes to the root of the contract and enables the innocent party to terminate the contract. The Respondent No.1 company by its letter of 19.2.99 terminated the entire contract both in respect of the uninstalled contract objects and also the installed contract objects.

. The substance and form of the aforesaid assertion leaves no manner of doubt that the Respondents had declared their obligations under the contract to be

over in respect of the 17,294 contract objects. It is submitted that it is well established that an innocent party who suffered such a breach is entitled to treat the entire contract as discharged.

. There was an offer in the letter of 19.2.99 to maintain the contract objects if the lease rent was paid without demur or dispute or was paid upfront within seven days. After this letter was addressed, negotiations continued with the Petitioners. The without prejudice negotiations are referred to in the meeting of 11.3.99 between the Chairman of the Petitioners and the 1st Respondent. This meeting was attended by the Respondents without prejudice to its rights and contentions. In the meeting the Chairman offered the Claimants an opportunity to continue with the contract. The Claimants continued to maintain the contract objects in terms of their offer. Ultimately on 21.4.99 when it was clear that the Petitioners were not in a mood to redress the breach nor were in a position to make payment in terms of the without prejudice offer to maintain, the 1st Respondent indicated that they were absolved from all liabilities under the contract.

. The Petitioners have placed reliance on some statement in the witness statement of Mr.Datar, the witness of the 1st Respondent Company. It is respectfully submitted that this has to be read along with the fact that the witness confirmed para 8 of the Statement of Claim.

10. It is submitted that it is not open to the Petitioners to contend that the work order did not stand terminated on 19.2.99 in view of the statement of their own witnesses. Obviously in view of this stand, the Petitioners contended that there was no question of renewing the Letter of Credit after its expiry.

11. In the Award the Tribunal has found that the contract stood terminated on 19.2.99 and hence the Petitioners were justified in not renewing the Letter of Credit. The Petitioners have not challenged this finding and are strongly relying upon the same to justify their conduct of non-renewal of Letter of Credit.

12. It is submitted that in view of the fact that

the Petitioners themselves through their witnesses asserted that the work order was terminated on 19.2.99, it is the Petitioners case which has been accepted by the Tribunal coupled with the fact that the Respondent Company had stated in para 8 that the contract was terminated on 19.2.99 and although they were not bound to maintain the contract objects they offered to do so.

13. It is submitted that the entire evidence has to be read as a whole and in fact the Arbitral Tribunal has accepted the plea of the witnesses of the Petitioners that the work order stood terminated on 19.2.99. The Petitioners cannot challenge this finding and now assert that there was no termination on 19.2.99 in respect of 17294 objects.

14. It is submitted that since there was a breach of the fundamental term of the contract as found by the Arbitral Tribunal, it is not open to a party who is guilty of breach to assert that the contract could continue in respect of 17294 panels. A party who is found to be in breach cannot split the contract and assert that a part of it must be performed or that a part of that is not terminated.

15. Both parties went to trial on the basis that the entire contract was terminated for fundamental breaches. It was not the case of the Petitioners at any stage of the proceedings that there was no fundamental breach in regard to 17294 panels or that the contract must be performed qua 17294 panels or that they were ready and willing to perform their part of the contract. The Respondents had asserted that there was a fundamental breach and the Tribunal has found in favour of the 1st Respondent.

16. It is submitted that it is not open to the Petitioners to put a different construction on the letter dt. 19.2.99 in view of the assertion of their own witnesses in the Arbitration Proceedings and in view of the settled position that the Arbitrators judgment on the terms of the letter must be accepted particularly when the Arbitrators have seen the entire evidence of both the parties and having heard them at length on their respective case. An interpretation of a document produced before the Arbitrators can be best judged by the Arbitrators themselves. It is not open to a party who is in a breach and who has now admitted before the Hon'ble

Court that they were in breach of their obligation to supply the DTC locations to assert that there was no termination of the contract on 19.2.99.

17. It is submitted that the determination of date of breach particularly when it is at the behest of the Petitioners themselves cannot be a subject matter of challenge before this Hon'ble Court. It is submitted that in any event before the commencement of the Arbitral Proceedings the whole of the contract stood terminated as admitted by the Petitioners at page 'E' of the Petition with reference to date 13.4.99.

18. It is submitted that a party in breach cannot assert that a part of the contract must be performed. It is settled law that an innocent party who suffers the breach is entitled to terminate the contract. Upon the termination the innocent party is entitled to be discharged from performance of all further obligations on the date of the breach.

19. Both parties have proceeded on the basis that the contract was terminated and led evidence on that basis. After analysis of evidence of the Respondents

and at the end of trial, the Arbitral Tribunal found that the contract was terminated on 19.2.99. The offer to maintain was not accepted by the Petitioners although it is an admitted position that the Respondents maintained the contract objects till the end of April 1999.

20. The Petitioners have submitted that failure to supply DTC locations which has been accepted in oral arguments in respect of all panels except 17,294 would not entitle the Respondents to terminate the contract in respect of 17,294 panels. No such arguments has been urged before the Arbitral Tribunal nor any such point being taken in the present Petition.

21. This submission any way is erroneous since the contract was for the manufacture, installation and maintenance of 47,987 contract objects. Various provisions of the contract show that it was one bargain for installation in 13 circles and 3 zones. The commencement of the contract was itself premised upon the complete lists being made available. Work under the contract was to go in accordance with the Order of Zone and B- 1, B-2 and B-3 obviously in

regard to 47,987 contract objects. The Petitioners were entitled to charge Liquidated Damages based on the total uninstalled contract objects. The Letter of Credit was opened for consolidated quantity. It is submitted that it is not possible to severe in a bargain in commercial contract. No such severance is possible at the behest of a party who is held to have committed fundamental breach of the contract. It is submitted that no specific performance of a part of the contract was possible at the instance of the Respondents. In any event it was not at the instance of the Petitioners who were found to be in breach of the contract. Sec. 12 of the Specific Relief Act precludes any such claim for specific performance for part of the contract. Sec. 14 of the Specific Relief Act prevents the specific performance in case of a contract which runs into minute details. It is submitted that the obligation to maintain 17,294 contract objects was an unperformed obligation. The Respondents being an innocent party who have suffered breach, was discharged from their obligations in accordance with settled law in as set out in Chitty on Contracts as set out in the judgement of Heymans v. Darwins Ltd. as under :

" To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved form future performance of his obligations under the contract is a more exact description of the position."

22. It is submitted that whatever might be the contention of the Petitioners regarding the exact date of termination in respect of 17,294 contract objects, the whole of the contract admittedly stood terminated when the Respondents stopped maintenance of the Contract Objects in April 1999. It is submitted that it is settled law that a party may accept the breach of the repudiating party by a conduct which signifies as such and there need not be any personal or written communication for such termination by conduct.

23. It is submitted that consistent with their offer to maintain the Contract Objects, the Respondents were entitled to rent atleast upto 19.2.99 and thereafter till they maintain the Contract Objects in

terms of their offer. It is submitted that the Respondents charged rent on the basis of their offer. All bills were marked "without prejudice". It is submitted that accordingly the said bills do not avail the Petitioners to allege the continuation of the contract beyond 19.2.99. It is submitted that u/s 73 of the Contract Act, where obligations resembling those created by a contract are not discharged, the injured person is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it. It is submitted that in the period 19th February till 31st March the aforesaid situation had arisen which entitled the Respondents to claim the rent for installed objects notwithstanding that the contract had been terminated on 19.2.99. It is submitted that it is therefore fallacious to contend that as the Respondents claimed the amounts as of 31.3.99 in respect of installed objects, the contract thereof continued. The Petitioners did not renew the Letter of Credit despite three requests made by the Respondents by letters dated 30.3.99, 6.4.99 and 15.4.99. By a letter dated 21.4.99 the Respondents finally intimated to the Petitioners that they were absolved from all their obligations under the

contract.

24. It has been submitted in the course of oral submissions that since the 1st Respondents had elected to seek rent for the stranded panels and therefore not entitled to assert his right as a party who has suffered a breach. This submission is misconceived for the following reasons :

i. There is no ground challenging the Award on the basis that the 1st Respondent had elected to seek rent for the stranded panels and hence was precluded from getting any relief.

ii. Even factually it is not correct to say that the Petitioners sought for rent for the stranded panels before the Arbitral Tribunal.

iii. The 1st Respondent company gave notices that they will seek rent for the stranded panels from time to time in view of the failure to furnish DTC locations. Rent for the stranded panels was not charged for the quarter of March 1998. It was charged for the quarters June ’98 and September ’98.

There has been no rent levied by the 1st Respondent since the entire payment for the quarter of December 1998 was not pressed.

iv. In view of the insistence of the Petitioners that they were not bound to pay for the stranded panels, their insistence that the amounts received in this regard for the quarters of June ’98 and September ’98 be forthwith refunded and their continued failure to provide DTC locations, the 1st Respondent terminated the contract on 19.2.99.

v. It is submitted that by the letter dated 19.2.99, the Respondent Company sought damages in respect of the entire uninstalled quantity including stranded panels .

vi. In the Statement of Claim, the Respondents sought damages equal to the agglomerated rent for all the contract objects contained in the work order including the stranded objects.

vii. The parties went to trial on the basis of this claim of the 1st Respondent. At no stage was it argued that the 1st Respondent is making a claim for

the rent of the stranded panels in the Arbitration Proceedings.

vii. It was argued orally that this showed that the 1st Respondent elected even in the Arbitration Proceedings to seek rent for the stranded panels.

25. It has been argued on behalf of the Petitioners that it was open to the Respondents to install the objects under category B-II without waiting for DTC locations. This is fallacious for the following reasons:

i) The Work Order clearly requires the furnishing of all locations which obviously would include B-I, B-II and B-III.

ii) The Superintending Engineers had to give the lists of all panels including B-II. As per clause 12 of the Work Order, the Superintending Engineer has a right to shift the location of panels and lessors were to install at "final locations" approved by the Superintending Engineer. The Petitioners in oral arguments relied on letters dated 5.9.97 and 7.9.97

to say that only B-I and B-III locations were asked for. Oral evidence was led to explain the circumstances under which the letters dated 5.9.97 and 7.9.97 were written by the Respondents. It is submitted that the said letters cannot be relied upon by the Petitioners out of context to the voluminous oral evidence in that regard and especially qua the said letters. It is submitted that assuming without admitting that the said letters gave any impression that B-II lists were not required, clause 5.1 and 12 of the Work Order would have a superseding effect in so far as the understanding of the parties are concerned and would not relieve the Petitioners of their duty to give DTC locations. It is significant that at no stage did the Petitioners informed the Respondents that they have to install B-II category panels at the same place from where they are to be removed.

iii) Even the letter of 17.6.98 which permitted the Respondents for simultaneous installation of B-I, B-II and it required the discipline of the feeder to be maintained i.e. it was necessary to identify the locations of B-I and B-III on a given feeder so that B-II could be shifted and installed over there or the

installation of B-I and B-III could be done on the feeder of B-II if it was so stated. In the cross examination of Mr.Ghodaskar, the letter dated 2.9.98 was shown and he admitted that the installation of sequence of feeder-wise installation was for B-I and B-III and not only for B-II. In any event the letter dated 17.6.98 envisaged "simultaneous installation" and not B-II in isolation.

26. It was argued by the Petitioners that Contract Objects could be installed feeder-wise without lists. This was also argued for installation under category B-II. The absurdity of proceeding feeder-wise without lists was demonstrated when Mr.Ghodaskar (Witness no.1 for the Petitioners herein) was cross examined.

27. The Arbitral Tribunal has categorically held that the Contract Objects are custom made for the Petitioners and are contract specific and cannot be disposed in the open market. The said finding of the Ld. Arbitrators has not been challenged by the Petitioners and nor did they lead any evidence to show to the contrary.

28. The Tribunal also referred to the efforts at mitigation made by the Respondents by trying to find buyers for the contract objects. The Tribunal referred to Exhibit C-16 which are letters addressed by the Respondents to three Electricity Boards Rajasthan, Karnataka and Andhra Pradesh. It is submitted that the Petitioners contention that the Respondents did not try to mitigate their loss is false. It is submitted that this Hon'ble Court in Hindustan Petroleum v. Bhatliboi reported in 2001(Supp.2) Bom.C.R. 547 held that the finding of the Ld. Arbitrators in respect of mitigation is a finding of fact and cannot be interfered with.

29. It has been argued that the 1st Respondent Company did not make efforts to mitigate the damage arising from the breach. It is submitted that there is oral evidence on efforts to mitigate the breach. The oral evidence of Mr.Datar the witness of the 1st Respondent Company establishes the efforts made to mitigate. The efforts included letters to various Electricity Boards and demonstrations to check up if there was any buyer for the Contract Object. These efforts were made at the time when the Petitioners did not give the DTC locations and the stranded

panels were mounting up i.e. July / August 1998. It is submitted that vide letter dated 2.6.98 the Petitioners were already cautioned that the clouds of litigation have started to gather. The disputes in respect of DTC were on the boiling point in August / September '98 and it is futile to suggest that the timing of efforts of mitigation not correct. All these efforts establish and this has been found by the Aribtral Tribunal that there was no market for the stranded panels. At no stage was it controverted by the Petitioners that the contract object was a custom made item or that there was no ready market for the same. The Statement of Claim asserts that the specifications of the contract object are proprietary specifications of the Petitioners and this has not been disputed in the arbitration proceedings.

30. It has been submitted by the Petitioners that the cost of material should have been deducted in respect of the uninstalled panels. This submission is fallacious for the following reasons :

i) In a contract of lease, the contract objects always belong to the lessor. This is a settled legal

position as is evident from the Judgment of this Court in 20th Century Finance v. Khanna reported in 1991(4) Bom.CR 301.

ii) Attention is also drawn to McGregor on damages. It has been stated as follows :

"868. Where the hirer fails to surrender the goods at the end of the contractual period of hire he is liable for the market value of the goods at the time of breach by failure to surrender."

iii) At no stage of the arbitral proceedings, did the Petitioners claim ownership of the panels and in fact at para 100, page 1709 of the Written Statement, the Petitioners stated as follows :-

" In any event it is respectfully submitted that if the Claimants are not interested in fulfilling their obligations under the contract, the Claimants are free to take back all installed contract objects without prejudice to the Respondents claim to damages".

iv) Further in the petition, the Petitioners have

categorically stated that:

"The Respondents submit that the contract was for lease of the contract objects and not the sale thereof. Upon termination of the contract by the Claimants, it was their duty to take back the contract objects and take care of the same and not leave the contract objects unattended".

v) On proper construction of the Work Order, it can never be argued that the Petitioners were owners of the material.

vi) It has been found by the Arbitral Tribunal at page 215 that "once an electronic instrument is dismantled, then the value almost becomes nil".

It is respectfully submitted that in view of the above, the cost of material can not be deducted from the damages awarded for the stranded panels.

vii) It has been argued that the Petitioners were virtually owners of the Contract Objects since they had right to continue the lease @ Re.1/-. This is a fallacious submission since this issue is considered

by the Arbitral Tribunal and it has been held in para 51 as follows:

"At the end of 10 years, the Claimants would have been entitled to a nominal lease rent of Re.1/-. This rent was fixed on the basis that the utility of the contract objects would come to an end by the end of 10 years".

viii) It must be noted that the right of the Petitioners to continue after 10 years would be on the basis that the contract would go through and cannot apply to a case where there is a breach. It is submitted that even if the contract had to go through, the Petitioners could never become owners and they cannot be in a better position if they are in breach of contract. It is submitted that the contract is in the nature of an operating lease and the Respondents were required to give service and no claim can be made by the Petitioners for ownership of any specific / ascertained object. The Respondents were discharging all duties and emphasizing all rights of ownership at all material times till the time they were prevented from so doing.

31. Now, if in the light of the rival submission the record is perused it shows that the Arbitral Tribunal has held that failure of the MSEB to supply the list of location where the contract objects were to be installed amounts to fundamental breach and therefore, has awarded damages also for 17294 contract objects which were already installed. The findings recorded by the Arbitral Tribunal read as under-

> **"The learned counsel for Respondents finally submitted that even assuming that there was a default on the part of the Respondents in not supplying all the lists of locations for installation of contract objects, still the said default should not be construed as a fundamental breach of the terms of the contract. The submission is not correct. A fundamental term of the contract is a stipulation which the parties have agreed as by expressly or by necessary implication or which the general law regards as condition which goes to the root of the contract, so that any breach of that**

term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and which would entitle such innocent party to terminate the contract. From the discussion hereinabove, it is clear that the installation of contract objects was dependant on supply of lists of locations where contract objects were to be installed. The claimants were not only to manufacture the contract objects but were to install them on distribution transformers spread over large area in different Circles. The work order was not only in favour of the Claimants but two other agencies and it was impossible for the Claimants to identify the locations where contract objects were to be installed. The work order specifically provides that lists of all locations would be supplied and taking into consideration the urgency a completion of the project within two years, the Respondents had issued direction to the Superintending Engineers to supply the lists within

fortnight from the date of receipt of copy of the order. The Officers placed at field level did not carry out the instructions inspite of various reminders from the Head Office. It is unfortunate that the Head Office lack control over the field Officers and which ultimately led to the failure of the project. In these circumstances, it is futile to even suggest that the breach was not a fundamental one.

The failure of the MSEB to give list of location is relatable to 30693 contract objects and not to 17294 contract objects, which were already installed. The question is, would the failure of the MSEB to supply list of location in relation to uninstalled contract objects vitiate the contract also in relation to 17294 installed contract objects. Perusal of the award shows that though the Arbitral Tribunal holds that failure of the MSEB to give location of uninstalled objects will amount to a fundamental breach even in relation to the installed objects, the Tribunal, in fact, has not given any reason for recording that finding. It was urged before me, as

observed above, on behalf of the Respondent No.1/ Datar that considering that contract for installation of 47987 contract objects was the composite undivisible contract, inability to install 30693 contract objects, affected the entire work and it became commercially unviable and therefore, the entire contract was terminated, but it appears that not only that this submission was not made before the Arbitral Tribunal, but this submission is also contrary to the conduct of the Respondent No.1/Datar. The Tribunal has held that the entire contract was terminated by letter dated 19-2-1999. But perusal of that letter shows that the finding is wrong. Relevant part of that letter reads as under:-

> **"Therefore, the entire rent payable by you to us for the 10 years contract for the uninstalled LTLMS has become payable up-front while simultaneously absolving us totally of all our obligations under the Work Order.**
>
> **As such, out of the total of 47,987 LTLMS**

covered under your Order, 17,294 Nos. have been installed, commissioned and maintained. 14,206 Nos. LTLMS are inspected but stranded for DTC locations. As such 30,693 Nos. LTLMS have been prevented by you from being installed and commissioned by your wrongfully withholding the DTC lists, although we were at all times ready and forthcoming and had made complete arrangements to complete each and every obligation under the contract diligently and effectively, well within the stipulated time and informed you about the same repeatedly at all levels of the Board.

We therefore, call on you to pay Rs.284,39,72,040.00 (Rupees Two Hundred Eighty Four Crores Thirty Nine Lacs Seventy Two Thousand Forty only) towards the entire rent for 30693 Nos. of LTLMS prevented by you from installation.

17,294 Nos.LTLMS have already been installed and commissioned and their maintenance etc. and continuation in your

circuit are not any longer binding on us. We, however, are offering to maintain the equipment as per terms of the Work Order for the complete duration provided that the rent for the same is forthcoming without demur or dispute."

32. It is clear from this paragraph that damages were claimed only in relation to 30693 contract objects which were uninstalled and rent was claimed in relation to 17294 contract objects which were already installed and offer was also made to maintain the installed objects. It is further pertinent to note here that even rent for the subsequent period in relation to the installed objects was actually paid by MSEB and received by the Respondent No.1/Datar. In the deposition the witness examined on behalf of the Respondent No.1/ Datar has also stated in categorical terms that by notice dated 19-2-1999 contract was partially terminated and that full termination of the contract was brought about on 30th April, 1999. As noted in para 9 above, it was submitted before me that Datar continued to maintain the installed objects after

19-2-1999 as per their offer. This shows that the finding of the Tribunal that the entire contract was terminated on 19-2-1999 is contrary to the stand taken by the Claimant- Datar. In my opinion, in the face of the stand taken by the Respondent No.1/Datar that because of failure of the MSEB to supply list of location , only contract in relation to uninstalled object is terminated, it does not lie in the mouth of Datar that failure of the MSEB to supply the list of location for 30693 contract objects makes the contract even for 17294 contract objects commercially unviable. The letter dated 19-2-1999 shows that though the contract in relation to the uninstalled objects was terminated, Datar was willing to continue to maintain the installed objects and receive rent for the same as per the terms of the contract, only condition was that the rent should be paid promptly, but that condition was not a new condition. The contract also provided for prompt payment of rent. Thus, Datar was willing to abide by the terms of the contract in relation to the installed objects even after 19-2-1999. Had the entire contract become commercially unviable because of the failure of M.S.E.B. to supply the list of locations, Datar would not have made the above

referred offer. Therefore, the argument of commercial unviability cannot be accepted. It is further pertinent to note that the same stand is reiterated by the Respondent No.1/Datar in the interim application that was filed before the Arbitral Tribunal. The conduct of the claimant Datar of terminating the contract in relation to the uninstalled objects by notice dated 19-2-1999 while continuing to maintain the installed objects after 19-2-1999 shows that their claim that the contract was not severable is not correct. As observed above the stand taken in the interim application by Datar is contrary to their stand taken in the Court, the stand taken in the interim application was pointed out by the Petitioner repeatedly during the course of arguments, but on behalf of Datar no attempt was made to explain why and how contradictory stands have been taken. In my opinion, before recording the finding that failure of the MSEB to supply the list of location is a fundamental breach also in relation to the installed objects, the tribunal was under a duty to consider the conduct of the claimant, which showed that according to the claimant the contract was severable and therefore though the contract in relation to the uninstalled

objects is terminated, the contract in relation to the installed objects is continued, because this conduct showed that the failure of the M.S.E.B. to give the list of location for installation of 30693 objects does not by itself make continuation of the contract in relation to the installed objects impossible or commercially unviable. Non-application of mind to this vital aspect by the tribunal amounts to breach of the principles of natural justice and therefore, in my opinion, vitiates the award. It is further to be seen here that the Arbitral Tribunal in its award has also held that there were two reasons given by Datar for terminating the contract. First reason was failure of the MSEB to supply the list of location and second reason was failure of the MSEB to renew the bank guarantee furnished under the Work Order beyond 30th April, 1999. The relevant observations is to be found in paragraph 14 of the Award. It reads as under:-

> **"The Claimants have raised twofold contentions to plead that the Respondents prevented the Claimants from performing**

their part of the contract. The first contention is that the Respondents failed to supply lists of DTC locations and thereby prevented the Claimants from carrying out the work of installation and deprived the Claimants of the lease rent. The second leg of the contention is that the Respondents did not renew the bank guarantee require to be furnished under the work order beyond April 30, 1999. The first part of the submission required detailed examination."

33. It is pertinent to note here that the first contention even according to Datar was relatable only to uninstalled contract objects. The second reason that was given namely non-renewal of the letter of credit was referable to the termination of the contract in relation to the installed objects. It is to be seen that the letter of credit to be given by M.S.E.B. under the contract has relevance to the claimant getting payment under the contract. As per the contract the claimant gets payment only after the objects are installed. Therefore, the

second contention of the claimant referred to by the Tribunal had nexus only with the installed objects. The two reasons given by the claimant were thus relatable to two parts of the contract, one in relation to the installed objects and the other in relation to the uninstalled objects. This shows that according to the claimant, the two parts of the contract were not only severable but two distinct reasons were given for terminating the two parts of the contract.The Tribunal itself has held that MSEB cannot be faulted for not renewing the letter of credit after 30th April, 1999. Perusal of the award shows that the Tribunal has given two reasons for holding that the MSEB cannot be faulted for not renewing the letter of credit after 30th April, 1999. The first reason is termination of the contract by Datar. Though the finding of the Arbitral Tribunal that termination of the entire contract was brought about on 19-2-1999 is not correct, it is clear from the record that the contract in relation to uninstalled objects was terminated by letter dated 19-2-1999 and the balance of the contract in relation to the installed objects was terminated by letter dated 21st April, 1999 by the Respondent No.1/ Datar. Thus, the termination

of the entire contract was brought about before 30th April, 1999 and therefore, the MSEB cannot be faulted for not renewing the bank guarantee after 30th April, 1999, because before 30th April, 1999 Datar had also invoked the arbitration clause. Thus, there is a clear finding recorded by the Arbitral Tribunal that the MSEB cannot be faulted for not renewing the letter of credit after 30th April, 1999. Thus, the reason given by the Respondent No.1/Datar for terminating the contract in relation to the installed object namely non-renewal of the letter of credit does not hold good, and therefore, there is no valid reason given for termination of the contract by Datar in relation to the installed contract objects. Therefore, I find that the Arbitral Tribunal was not justified at all in awarding any damages in relation to the installed objects. It is to be seen that the reason given by the claimant in the notice dt.19-2-1999 for termination of the contract is the failure of the M.S.E.B. to give list of location and therefore the contract in relation to the uninstalled objects is terminated by the claimant. He, however, continued to maintain the installed objects, therefore, continued the contract in relation to the installed

objects, the M.S.E.B. also continued to pay him the lease rent for installed objects after 19-2-1999. Thus the conduct of both the parties shows that the contract in relation to the installed objects continued to be in force after 19-2-1999. Therefore, the reason of the failure of the M.S.E.B. to give the list of location is not related to the installed objects. The contract in relation to installed objects, which continued to exist after 19-2-1999 was terminated by the Claimant on 21-4-1999. The reason given for terminating the contract in relation to the installed objects is non-renewal of the letter of credit. The letter of credit has no nexus with the uninstalled objects. It has nexus with the contract in relation to the installed objects. I have found that the reason given by the Claimant for terminating the contract in relation to the installed objects i.e. non-renewal of the letter of credit is non-existent. Therefore, there can be no justification for awarding any damages to the Claimant in relation the installed objects. It is pertinent to note here that out of the awarded amount of Rs.185,97,86,399/-, an amount of Rs.108,02,53,173/- has been awarded in relation to the installed

objects. In my opinion, therefore, for this sole reason the award is liable to be set aside.

34. It is further to be seen here that though the finding of the Arbitral Tribunal that failure of the MSEB to supply the list of location is a breach of contract committed by MSEB is a finding of fact and and it was also not challenged before me. The question that arises is whether the Tribunal was justified in terming that breach as a fundamental breach so as to vitiate the entire contract. It is submitted that out of 47987 contract objects for which the Work Order was given, 17294 objects were actually installed and 14206 objects were manufactured by the Respondent No.1/Datar and they were also inspected. These objects have been referred to as stranded objects. It is to be seen that though because of failure of MSEB to give list of location, these stranded objects which were ready for installation could not be installed by Datar, Datar actually charged rent from MSES for these stranded objects and received the same. In charging rent for the stranded objects the case of Datar is that because these objects have been manufactured and have been subsequently inspected by the MSEB,

these objects are deemed to have been installed and therefore, Datar is entitled to claim rent as per the Work Order in relation to these objects. It clearly, therefore, means that the stand taken by Datar was that for he becoming entitled to claim rent under the Work Order,it is not necessary that the contract objects should be installed at the location, he becomes entitled to claim rent after inspection of the contract objects by the MSEB. Thus, installation of the objects on the location is not necessary for his entitlement to receive the rent and commencement of the lease. Now, this stand is totally inconsistent with the other stand taken by Datar that supply of list of the locations which is necessary only for the purpose of installation of the objects results in vitiating the contract. These two stands being inconsistent, though may be pleaded, the party pleading these inconsistent stands will have to elect one of of them at the trial. Perusal of the award, however, shows that this stand that Datar is entitled to receive the rent for the stranded objects is not abandoned or given up by Datar at any point of time. In as much as, in paragraph 43 of the Award the Tribunal has observed thus:-

> **43.....It is the stand of the Claimants that once the contract objects were cleared for installation and if the installation cannot be carried out for want of lists of locations, then the right to claim lease rent arises. The submission is clearly untenable. The plain reading of the work order makes it crystal clear that the entitlement to the lease rent accrues on installation of contract objects and preparation of commissioning report. The Claimants could claim damages for the objects which remained stranded in the factory because of failure of the Respondents to supply lists of locations, but it was not permissible to claim lease rent as per the terms of the work order in respect of stranded objects.**

35. It is thus clear from the above observations that even before the Tribunal, at the trial, this stand was not given up. Maintaining of these

inconsistent stand by the Respondent No.1/Datar before the Tribunal should have resulted in rejection of both the stands. While maintaining that without installation of the contract objects Datar is entitled to claim rent, Datar can not claim that failure of the MSEB to supply the lists of location results in termination of the entire contract. It is pertinent to note that the lease rent which was recovered by Datar for stranded object was tried to be refunded by issuing the credit voucher one day before the termination letter dated 19-2-1999, but that was also done under protest and provisionally. It was submitted before me that the conduct of the claimant of issuing credit voucher for the adjustment of the rent recovered for the stranded object on 18-2-1999 amounts to the claimant giving up the stand. But in the face of the observations of the Tribunal quoted above it shows that not only that stand was not given up on 18-2-1999, but it was pressed before the arbitral tribunal. In any case, in view of the observations of the Tribunal quoted above in the award, it is clear that stand about entitlement to receive the lease rent for stranded objects was never given up. It is pertinent to note that this

aspect of the matter has nowhere been considered by the Arbitral Tribunal in its award.

36. The observations in the award quoted above show that the tribunal was aware of the stand taken by the claimant in relation to the entitlement of the claimant for the rent of stranded objects. The two stands i) that the failure of the M.S.E.B. to give the list of location amount to fundamental breach of the contract, because the claimant becomes entitled to charge lease rent only after the contract objects are installed and the failure to supply list of locations results in the claimant being saddled with thousand of contract objects which are manufactured and inspected without being entitled to receive anything for these and ii) that the claimant becomes entitled to charge lease amount after the contract object is inspected by the M.S.E.B., though it is not installed on location because the M.S.E.B. has not indicated the location, are so inconsistent and so contradictory that they cannot be pressed together. A party who has pleaded these contradictory stands will have to give up one of them at the trial. But if the party does not elect and give up one of the stand, the court will have no

option but to reject both of them. In my opinion, exclusion of the vital and crucial aspect of the matter from consideration by the tribunal vitiates the Award.

37. Before me, considerable arguments were advanced, whether failure of the MSEB to supply lists of location will affect the Work Order in relation to B-2 Category. In my opinion, however, as the finding that has been recorded by the Arbitral Tribunal is a finding of fact and in view of the terms in the Work Order a possible finding, it will not be appropriate for me to disturb that finding.

38. Before me there was considerable debate as to whether the Tribunal has committed a grave error in computing damages. Perusal of the award shows that the Tribunal has awarded as damages rent of 7 years in so far as the installed objects are concerned. It has awarded rent of 5 years so far as stranded objects are concerned. In awarding rent of 5 years for the stranded objects the Tribunal has noted that the only difference between the installed objects

and the stranded objects is that the installed objects have been fitted on the location, whereas the stranded objects are yet to be installed or fitted and therefore has deducted rent of two years towards installation charges. In my opinion, however, the Tribunal has committed a grave error in not noting one important and vital aspect of difference between the two categories namely that in relation to the installed objects, the objects are with the MSEB, whereas the stranded objects continue to be with Datar. In my opinion, the fact that the stranded objects continue with Datar should have been taken into consideration by the Arbitral Tribunal in computing the amount of damages to be awarded in relation to the stranded object. The aspect, that in so far as the installed objects are concerned, the M.S.E.B. pays the damages and keeps the objects whereas and in so far as the stranded objects are concerned, the M.S.E.B. pays the damages but Datar keeps the objects, was a relevant and material aspect so far as working out the amount of damages is concerned. Omission of this relevant and material aspect from consideration by the Tribunal, in my opinion, vitiates the Award.

39. In the award, the Arbitral Tribunal has held that an attempt was made by Datar to mitigate the damages. The relevant observations are to be found in paragraph 55 of the award. It reads as under:-

> **55. The Respondents submitted that the Claimants did not make any efforts to mitigate the loss suffered. The submission is without any merit for more than one reason. In the first instance, the contract objects manufactured in pursuance of the orders of the Respondents were custom built i.e. to the specifications laid down by the Respondents and these contract objects cannot be disposed in open market. Datar deposed with reference to Exh.C-16 that efforts were made to sell the contract objects stranded in the factory to other Electricity Boards but those efforts did not succeed. It was contended by the Respondents that the claimants should have dismantled the stranded contract objects and sold the components thereof. The**

submission is only required to be stated to be rejected. Once an electronic instrument is dismantled, then the value almost becomes nil. In any event, the Claimants have established that efforts were made to mitigate the loss.

40. It was pointed out that all the letters at Exh.16 referred to by the Tribunal were addressed by Datar to the Electricity Boards from September 1998 to November, 1998, whereas the termination of the contract in relation to the uninstalled objects is in February, 1999. Therefore, so far as the aspect of mitigation of the damages are concerned, the letters addressed in September, 1998 and November, 1998 are not relevant. On behalf of Datar, it was contended that mitigation of damages is merely a factor to be taken into account in assessing the damages. Even if the submission of Datar is accepted, then also it is clear that the Tribunal has recorded a finding that there was an attempt made by Datar to mitigate the damages on the basis of totally irrelevant material. In any case while considering the letters sent in September, 1998 and

November, 1998, the tribunal ought to have considered that the letters were sent much before the termination of the contract. Non-consideration of the fact that the letters relied on by Datar were sent much before the alleged breach had taken place introduces a vital flaw in the finding recorded by the Arbitral Tribunal.

41. There was considerable debate before me with reference to the judgments of the House of Lords in the case of Photo Production Ltd. V/s. Securicor Transport Ltd. and in the case of Suisse Atlantiqu v/s. N.V. Rotterdamsche, on the question whether as a result of fundamental breach only unperformed obligations are discharged or even the performed obligations are affected. However, in view of the findings recorded above that the claimant itself treated the contract as a severable and terminated the contract in relation to the unperformed obligations only, it is not necessary for me to consider this aspect.

42. For all these reasons, specially, because I find that there was at all no justification

whatsoever for the Tribunal to award the damages in relation to the installed objects, the award is liable to be set aside.

43. There were submissions made before me that this petition could have been prosecuted only by the State Government, because it is not clear from the notification dated 4-6-2005 issued by the Government of Maharashtra under Sections 131, 133 and 134 of the Electricity Act, 2003 that the contingent liabilities of the MSEB have been taken over by the Petitioner No.2. In my opinion, however, in view of the clear statement made in the affidavit filed on behalf of the Petitioner No.2 that all the contingent liabilities including the liability under the impugned award is taken over by the Petitioner No.2, it was not necessary to join the State Government as the Petitioner in this petition.

44. In the result, therefore, the petition succeeds and is allowed. The award impugned in the petition is set aside. The Respondent No.1/Datar is directed to pay costs of this petition to the Petitioners, as incurred by the Petitioners.

...